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KETUA PENGARAH HASIL DALAM NEGERI v. KIND ACTION (M) SDN BHD

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
RHODZARIAH BUJANG FCJ
B ABU BAKAR JAIS FCJ
[CIVIL APPEAL NO: 01(f)-18-05-2024(J)]
13 MARCH 2025

C **Abstract** – *The Inland Revenue Board ('Revenue'), under the Real Property Gains Tax Act 1976 ('RPGTA'), ought to consider the contents of the taxpayer's returns in order to decide whether to accept it or make adjustments, and thereafter, raise the assessment. Once the assessment is raised and the RPGTA assessment and certificate of clearance issued,* D *in the absence of any appeal against the same, the Revenue's decision is final and conclusive. Nowhere in the RPGTA is it provided that the Revenue could take the returns 'on the surface' and 'keep open the various alternatives' as that would result in a perpetual uncertainty in tax position, which could not be the intention of Parliament. The law clearly prohibits the Revenue from double taxation, hence, where a taxpayer has* E *been taxed under the RPGTA, the same party could not be subjected to tax under the Income Tax Act 1967 ('ITA') on the same transaction. Where such notice of assessment is issued, it would amount to a gross violation of the principle of double taxation and gives rise to illegality. There is no possibility of an overlap between tax payable under the ITA* F *and RPGTA.*

ADMINISTRATIVE LAW: *Judicial review – Proceedings – Application to quash notices of additional assessment issued by Inland Revenue Board ('Revenue') –* G *Whether taxpayer should avail itself of domestic remedy under Income Tax Act 1967 – Whether proper forum was appeal to Special Commissioner for Income Tax – Whether availability of domestic remedy would bar application for judicial review – Whether decision of Revenue tainted with illegality – Whether matter rightfully brought by judicial review – Rules of Court 2012, O. 53*

H ***REVENUE LAW:*** *Income tax – Additional assessment – Finality of assessments – Assessments under Real Property Gains Tax Act 1976 ('RPGTA') – Issuance of RPGTA assessments and RPGT certificates – Subsequent notices of additional assessment under s. 4(1) of Income Tax Act 1967 without discharging or revoking RPGTA certificate of clearance and assessments – Absence of appeal by taxpayer –* I *Whether assessments under RPGTA final and conclusive – Whether necessary adjustments should have been made before issuance of assessments under RPGTA –*

Whether notices of additional assessments amounted to gross violation of principle of double taxation – Whether issuance of notices tainted with illegality – Real Property Gains Tax Act 1976, ss. 14(1)(b), 20(1) & (2)

STATUTORY INTERPRETATION: *Construction of statutes – Taxing statutes – Real Property Gains Tax Act 1976, s. 20 – Finality of assessment – Duty of court – Interpretation of words used by Legislature and not to read words into statute – Whether ambiguity in law construed in favour of taxpayer*

WORDS & PHRASES: *'final and conclusive' – Real Property Gains Tax Act 1976, s. 20 – Finality of assessment – Assessment under Real Property Gains Tax Act 1976 ('RPGTA') – Issuance of RPGTA assessments and certificates – Subsequent notices of additional assessment under Income Tax Act 1967 without discharging or revoking RPGTA certificate of clearance and assessments – Whether amounted to gross violation of principle of double taxation – Whether issuance of notices tainted with illegality*

The respondent entered into a sale and purchase agreement ('SPA') with its parent company, Revertex Malaysia Sdn Bhd ('RMSB'), where plantation lands used by RMSB ('Mengkibol Estate') were transferred to the respondent. At all material times, the respondent derived its income from its plantation business conducted on the Mengkibol Estate, which has always been recognised in the respondent's audited account as a fixed asset for the relevant years of assessment ('YA'). The respondent had duly paid income tax upon the same. Subsequently, pursuant to a strategic decision to streamline its business activity, the respondent's ultimate holding company in the UK, decided to withdraw from the plantation business altogether and focus on its chemical manufacturing business. Towards that end, the respondent was to realise its investments in part of the Mengkibol Estate. Those lands were subsequently subdivided into smaller lots ('plantation lands') and, between 2007 and 2017, the respondent sold its plantation lands to various parties *vide* several SPAs. In respect of these disposals of the lands, the respondent paid the real property gains tax ('RPGT') under the Real Property Gains Tax Act 1976 ('RPGTA'). The RPGTA assessments and the RPGT certificates were issued by the appellant over a period of seven years from 2011-2018. However, in October 2019, the appellant took the position that the proceeds from the respondent's realisation of its investments in the plantation lands was subject to income tax under s. 4 of the Income Tax Act 1967 ('ITA'). This was based on, among others, that the respondent's activities of realising its investments were in the nature of trade. Therefore, the appellant raised notices of additional assessments for YA 2010, 2015 and 2018 upon the respondent, imposing income tax and 60% penalties totalling more than RM81 million. The appellant did not discharge or revoke the earlier RPGTA certificate of clearance and RPGTA assessments in respect of the same transactions. The respondent contended that by not discharging or revoking the earlier RPGT certificate of clearance and assessments, the

appellant's conduct was illegal and contrary to the principle against double taxation. The respondent filed an appeal under Forms Q to the Special Commissioner of Income Tax ('SCIT'). The respondent also filed judicial review proceedings in the High Court, seeking: (i) an order for *certiorari* to quash the notices of additional assessments for YA 2010, 2015 and 2018 issued by the Inland Revenue Board ('Revenue') under the ITA; (ii) a declaration that the notices were invalid in law; and (iii) a declaration that the Revenue was bound by its action in recognising, accepting and acknowledging that the profit (if any) from the realisation of investments of the plantation lands were subjected to RPGTA and thus the Revenue could not impose tax on the respondent under the ITA. The High Court dismissed the respondent's application. However, the decision was reversed by the Court of Appeal. Leave to appeal was granted to the appellant on the following questions of law: (i) whether the Court of Appeal could extend the reading of s. 20 of the RPGTA relating to appeal under the RPGTA on the assessment raised under the ITA; (ii) whether finality of assessment under s. 20 of the RPGTA makes this appeal limited to RPGTA only or otherwise; (iii) whether the Court of Appeal has jurisdiction to make findings of facts in a judicial review when the jurisdiction to find facts was vested in the SCIT; (iv) whether disputes relating to the merits of assessment raised under a taxing legislation involving a question of law or mixed questions of law and facts may be determined by way of a judicial review; (v) whether the appellant, as a statutory body, could be estopped from exercising its statutory duty under the tax laws; (vi) whether the appellant could raise tax assessments under the ITA in exercising its statutory duty despite the self-declaration by the respondent under the RPGTA; and (vii) whether double taxation existed under the ITA and RPGTA.

Held (dismissing appeal with costs; declining to answer leave questions)
Per Tengku Maimun Tuan Mat CJ delivering the judgment of the court:

(1) The appellant had accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance and RPGTA assessments under s. 14 of the RPGTA. Since there were no appeals filed by the respondent, the assessments became final and conclusive under s. 20. The courts will not read words into a statute. The duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. Hence, the submission by the appellant that the appellant could still tax the respondent for income under ITA after an audit is done even if tax or assessment for capital under the RPGTA is final and conclusive, would cause a gross violation of the principle of double taxation and would run counter to the finality provision in s. 20(1). The words in s. 20(1) are clear and there was no reason not to give effect to the clear words of 'final and conclusive' in the section. If there is no appeal by a taxpayer, and the circumstances stipulated under s. 20(2) do not arise, the assessment under RPGTA is final and conclusive. (paras 38, 41, 42 & 46)

(2) Nowhere in the RPGTA is it provided that the appellant could take the RPGT return 'on the surface' first and think about it later. It would be consistent with good governance that the appellant undertook an investigation or audit first, before issuing the assessment. This would be consistent with the overall scheme of s. 14(1) of the RPGTA which gives the discretion to the Director General of Inland Revenue to either accept the return and make an assessment accordingly or make an assessment after making such adjustments as he considers necessary. The appellant's position to 'keep open the various alternatives' could not be accepted as that position amounted, in effect, to taxing the respondent under both the RPGTA and the ITA. The law clearly prohibits the appellant from taking that course of action. To 'keep open the various alternatives' would also result in a perpetual uncertainty in tax position. This could not be the intention of Parliament having regard to the final and conclusive provision of the law. (paras 47 & 48)

(3) The appellant, under s. 14(1)(b), could have made the necessary adjustments before issuing the assessments under the RPGTA. The appellant did not deem it necessary to do so, and instead, issued the RPGTA certificate of clearance and assessments. Seven years later, the appellant issued notices/assessments under the ITA for the same transactions of the respondent's plantation lands. The earlier RPGTA certificate of clearance and the RPGTA assessments were not revoked. This in effect resulted in double taxation for the same land transactions but under two different legislations, *ie*, once under the RPGTA and later under the ITA. This was clearly an illegality. (para 50)

(4) To accept the appellant's submission that the RPGTA certificate of clearance and the RPGTA assessments be held in abeyance, would render s. 20 of the RPGTA completely redundant. There was nothing in the RPGTA that speaks of holding the RPGTA certificate of clearance and assessments in abeyance. The Revenue is, if the facts and circumstances warranted it, free to revise and discharge the assessment under the RPGTA and to then raise an assessment under the ITA (*Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri*). The issue that the appellant could not be estopped from performing its statutory functions did not arise here as the appellant was only expected to perform its function as required by law and not otherwise. (paras 66, 67 & 68)

(5) The appellant's certificate of clearance and assessments under the RPGTA which were never discharged or revoked, had created a legitimate expectation on the part of the respondent that they were correct and the appellant was now estopped from shifting its position. The appellant's decision was tainted with illegality. Thus, the matter was rightfully brought by the respondent by judicial review to quash the

illegal decision. The appellant's submission that complaints on legitimate expectation are matters that should be raised and determined by the SCIT was also devoid of any merit. The High Court erred in concluding that the proper forum was SCIT and in taking a contradictory stand by dealing with the merits. Having found that the merits were appropriately for the SCIT to determine, the High Court should not have proceeded to decide on the issues of negligence, limitation and sinister or bad faith. (paras 73, 79, 80 & 82)

Per Abu Bakar Jais FCJ (concurring):

(1) The appellant, having accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance, had acted on the basis of s. 14(1)(a) of the RPGTA. Further, since there were no appeals filed by the respondent, the assessment became final and conclusive pursuant to s. 20(1) of the RPGTA. In the circumstances, estoppel *in pais* (estoppel by words or conduct) would apply, preventing the appellant to impose the tax under the ITA. Further notices for tax under the ITA raised by the appellant, without discharging or revoking the earlier RPGTA certificate of clearance and assessments, had resulted in the same land transactions being subjected to tax under two different legislations. That action and conduct of the appellant was clearly illegal and must amount to double taxation. Also, there was no provision in the RPGTA that stipulates RPGTA certificate of clearance and RPGTA assessments can be held in abeyance. (paras 87-89, 91, 92 & 95)

(2) There was no obligation for the respondent to go before the SCIT prior to seeking the appropriate remedy by way of judicial review before the High Court. There is no requirement in O. 53 of the Rules of Court 2012 that the availability of a domestic remedy would bar an application for judicial review. The availability of an alternative internal remedy in the form of an appeal process will not be a complete bar of an application for judicial review. There was an excess or abuse of power as the appellant should not have further imposed tax on the respondent under the ITA, having done so under the RPGTA. Therefore, the respondent should not be prohibited in applying for judicial review. (paras 96, 97 & 99)

Bahasa Melayu *Headnotes*

Responden memasuki perjanjian jual beli ('PJB') dengan Revertex Malaysia Sdn Bhd ('RMSB'), syarikat induknya di mana tanah-tanah pertanian yang diguna oleh RMSB ('Ladang Mengkibol') dipindah milik pada responden. Pada setiap masa material, responden memperoleh pendapatan daripada perniagaan pertanian yang dikendalikan di Ladang Mengkibol, yang pada setiap masa dinyatakan dalam akaun beraudit responden sebagai aset tetap untuk tahun-tahun taksiran ('YA') relevan. Responden telah membayar cukai

pendapatan untuk itu. Kemudian, berikutan satu keputusan strategik untuk menyelaraskan aktiviti perniagaan, syarikat induk utama responden di United Kingdom memutuskan untuk menarik diri daripada keseluruhan perniagaan pertanian dan memfokus dalam perniagaan pembuatan kimia. Untuk itu, responden sepatutnya memperoleh semula pelaburan dalam sebahagian Ladang Mengkibol. Tanah-tanah itu kemudian dipecah bahagi pada lot-lot lebih kecil ('tanah-tanah pertanian') dan, antara 2007 dan 2017, responden telah melupuskan tanah-tanah pertanian itu kepada pelbagai pihak melalui beberapa PJB. Berhubung dengan pelupusan tanah-tanah itu, responden telah membayar cukai keuntungan harta tanah ('CKHT') bawah Akta Cukai Keuntungan Harta Tanah 1976 ('Akta CKHT'). Notis taksiran dan sijil perakuan tidak kena cukai bawah Akta CKHT dikeluarkan perayu untuk tempoh tujuh tahun dari 2011 hingga 2018. Walau bagaimanapun, pada Oktober 2019, perayu memutuskan bahawa hasil pelupusan pelaburan responden dalam tanah-tanah pertanian tertakluk pada cukai tanah bawah s. 4 Akta Cukai Pendapatan 1967 ('ACP'). Ini berdasarkan, antara lain, aktiviti-aktiviti responden menjual pelaburannya bersifat perniagaan. Oleh itu, perayu membangkitkan notis taksiran tambahan untuk YA 2010, 2015 dan 2018 terhadap responden, mengenakan cukai pendapatan dan 60% denda berjumlah lebih RM81 juta. Perayu tidak melepaskan atau membatalkan sijil perakuan tidak kena cukai bawah Akta CKHT dan taksiran Akta CKHT berkaitan transaksi-transaksi sama. Responden menghujahkan, tanpa pelepasan atau pembatalan sijil perakuan tidak kena cukai dan taksiran CKHT, tindakan perayu tidak sah dan bertentangan dengan prinsip percukaian berganda. Responden memfailkan rayuan bawah Borang Q pada Pesuruhjaya Khas Cukai Pendapatan ('PKCP'). Responden juga memfailkan prosiding semakan kehakiman di Mahkamah Tinggi, memohon: (i) perintah *certiorari* untuk membatalkan notis taksiran tambahan untuk YA 2010, 2015 dan 2018 yang dikeluarkan Lembaga Hasil Dalam Negeri ('LHDN') bawah ACP; (ii) deklarasi bahawa notis-notis itu tidak sah di sisi undang-undang; (iii) deklarasi bahawa LHDN terikat dengan keputusannya mengiktiraf, menerima dan mengakui bahawa keuntungan (jika ada) hasil pelupusan pelaburan tanah-tanah pertanian tertakluk pada Akta CKHT dan oleh itu, LHDN tidak boleh mengenakan cukai terhadap responden bawah ACP. Mahkamah Tinggi menolak permohonan responden. Walau bagaimanapun, keputusan itu diakas oleh Mahkamah Rayuan. Kebenaran merayu dibenarkan pada perayu atas soalan-soalan undang-undang berikut: (i) sama ada Mahkamah Rayuan boleh melanjutkan pembacaan s. 20 Akta CKHT berkaitan rayuan bawah Akta CKHT untuk taksiran yang dibangkitkan bawah ACP; (ii) sama ada kemuktamadan taksiran bawah s. 20 Akta CKHT menjadikan rayuan ini terhad pada Akta CKHT sahaja atau sebaliknya; (iii) sama ada Mahkamah Rayuan mempunyai bidang kuasa untuk membuat dapatan fakta dalam semakan kehakiman apabila bidang kuasa untuk membuat dapatan fakta terletak hak pada PKCP; (iv) sama ada pertikaian berkaitan merit taksiran yang dibangkitkan bawah perundangan percukaian

melibatkan soalan-soalan undang-undang atau gabungan soalan-soalan undang-undang dan fakta boleh ditentukan melalui semakan kehakiman; (v) sama ada perayu, sebagai badan berkuasa awam, boleh diestop daripada melaksanakan kewajipan statutorinya bawah undang-undang percukaian; (vi) sama ada perayu boleh membangkitkan taksiran cukai bawah ACP apabila melaksanakan kewajipan statutori walaupun dengan deklarasi sendiri oleh responden bawah Akta CKHT; dan (vii) sama ada terdapat percukaian berganda bawah ACP dan Akta CKHT.

Diputuskan (menolak rayuan dengan kos; menolak menjawab soalan-soalan undang-undang)

Oleh Tengku Maimun Tuan Mat KHN menyampaikan penghakiman mahkamah:

(1) Perayu menerima penyata CKHT yang difailkan responden dan mengeluarkan sijil perakuan tidak kena cukai CKHT dan taksiran CKHT bawah s. 14 Akta CKHT. Oleh sebab tiada rayuan oleh responden, taksiran itu muktamad dan konklusif bawah s. 20. Mahkamah tidak akan mentafsir luar daripada statut. Tanggungjawab mahkamah terhad pada pentafsiran bahasa yang digunakan oleh Perundangan dan memberi kesan pada perkataan-perkataan yang digunakan olehnya. Oleh itu, hujahan perayu bahawa perayu masih boleh mencukai responden bawah ACP selepas audit dibuat walaupun cukai atau taksiran modal bawah Akta CKHT adalah muktamad dan konklusif, akan menyebabkan percanggahan teruk prinsip percukaian berganda dan bertentangan dengan peruntukan kemuktamadan bawah s. 20(1). Perkataan-perkataan dalam s. 20(1) adalah jelas dan tiada sebab untuk tidak memperakui perkataan-perkataan jelas 'muktamad dan konklusif' dalam seksyen itu. Jika tiada rayuan oleh pembayar cukai, dan hal keadaan yang dinyatakan bawah s. 20(2) tidak timbul, taksiran bawah Akta CKHT adalah muktamad dan konklusif.

(2) Tiada peruntukan bawah Akta CKHT bahawa perayu boleh menerima penyata CKHT 'secara zahir' dahulu dan memikirkannya kemudian. Tadbir urus yang baik akan lebih konsisten jika perayu melakukan siasatan atau audit terlebih dahulu, sebelum mengeluarkan notis taksiran. Ini konsisten dengan keseluruhan skim s. 14(1) Akta CKHT yang memperuntukkan budi bicara pada Ketua Pengarah Hasil Dalam Negeri untuk sama ada menerima penyata dan membuat taksiran sewajarnya atau membuat taksiran selepas melakukan pelarasan yang dianggap perlu. Kedudukan perayu untuk 'membuka alternatif-alternatif berlainan' tidak boleh diterima kerana itu bermaksud, sebenarnya, mencukai responden bawah kedua-dua Akta CHKT dan ACP. Undang-undang jelas melarang perayu daripada mengambil tindakan sedemikian. Untuk 'membuka alternatif-alternatif berlainan' akan mengakibatkan

ketidaktetapan berterusan kedudukan percukaian. Ini bukan niat Parlimen untuk membuat peruntukan bersifat muktamad dan konklusif di sisi undang-undang.

(3) Perayu, bawah s. 14(1)(b), sepatutnya membuat pelarasan yang perlu sebelum mengeluarkan notis taksiran bawah Akta CKHT. Mereka tidak anggap itu perlu, dan sebaliknya, mengeluarkan sijil perakuan tidak kena cukai dan taksiran bawah Akta CKHT. Tujuh tahun kemudian, perayu mengeluarkan notis-notis/taksiran bawah ACP untuk transaksi-transaksi sama tanah pertanian responden. Sijil perakuan tidak kena cukai dan taksiran CKHT tidak dibatalkan. Ini mengakibatkan percukaian berganda transaksi tanah sama bawah dua perundangan berbeza, iaitu, satu bawah Akta CKHT dan kemudian bawah ACP. Ini jelas tidak sah.

(4) Untuk menerima hujahan perayu bahawa sijil perakuan tidak kena cukai dan taksiran CKHT perlu ditangguhkan, akan menjadikan s. 20 Akta CKHT tidak berguna. Tiada apa-apa dalam Akta CKHT yang memperuntukkan tentang penangguhan sijil perakuan tidak kena cukai dan taksiran CKHT. LHDN, jika fakta dan hal keadaan membenarkan, bebas untuk menyemak semula dan melepaskan taksiran bawah Akta CKHT dan kemudian membangkitkan taksiran bawah ACP (*Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri*). Isu bahawa perayu tidak boleh diestop daripada melaksanakan fungsi statutorinya tidak timbul di sini kerana perayu hanya diperlukan untuk melaksanakan fungsi seperti yang diperlukan bawah undang-undang dan bukan sebaliknya.

(5) Sijil perakuan tidak kena cukai dan taksiran bawah Akta CKHT yang tidak dilepaskan atau dibatalkan, membentuk harapan sah pada pihak responden bahawa mereka adalah betul dan perayu kini diestop daripada menukar kedudukan itu. Keputusan perayu tercemar dengan ketaksahan. Oleh itu, responden betul apabila memulakan tindakan melalui semakan kehakiman untuk membatalkan keputusan tidak sah itu. Hujahan perayu bahawa aduan tentang harapan sah adalah perkara yang perlu dibangkitkan dan diputuskan oleh PKCP juga tanpa merit. Mahkamah Tinggi khilaf apabila memutuskan forum yang betul adalah PKCP dan apabila mengambil keputusan bertentangan dengan memutuskan atas merit. Setelah mendapati merit sepatutnya ditentukan oleh PKCP, Mahkamah Tinggi tidak wajar meneruskan untuk memutuskan tentang isu-isu kecuaian, had masa dan kecurigaan atau niat jahat.

Oleh Abu Bakar Jais HMP (menyetujui):

(1) Perayu, apabila menerima penyata CKHT yang difailkan responden dan mengeluarkan sijil perakuan tidak kena cukai bawah Akta CKHT, bertindak berdasarkan s. 14(1)(a) Akta CKHT. Selanjutnya, oleh sebab tiada rayuan oleh responden, taksiran itu menjadi muktamad dan konklusif menurut s. 20(1) Akta CKHT. Dalam keadaan itu, estoppel

in pais (estopel melalui kata-kata atau tindakan) diguna pakai, menghalang perayu mengenakan cukai bawah ACP. Notis-notis lanjut untuk cukai bawah ACP yang dibangkitkan oleh perayu, tanpa melepaskan atau membatalkan sijil perakuan tidak kena cukai dan taksiran CKHT, menjurus pada transaksi tanah sama dikenakan cukai bawah dua perundangan berbeza. Tindakan dan kelakuan perayu jelas tidak sah dan membentuk cukai dua kali. Juga, tiada peruntukan bawah Akta CKHT yang menyatakan sijil perakuan tidak kena cukai dan taksiran CKHT boleh ditangguhkan.

(2) Responden tidak perlu membuat permohonan pada PKCP sebelum memohon remedi sewajarnya melalui semakan kehakiman ke Mahkaman Tinggi. Tiada keperluan dalam A. 53 Kaedah-kaedah Mahkamah 2012 bahawa remedi dalaman akan menghalang permohonan semakan kehakiman. Remedi dalaman dalam bentuk proses rayuan bukan halangan menyeluruh untuk permohonan semakan kehakiman. Wujud kelebihan atau penyalahgunaan kuasa kerana perayu tidak sepatunya mengenakan cukai tambahan terhadap responden bawah ACP, setelah berbuat demikian bawah Akta CKHT. Oleh itu, responden tidak sepatutnya dihalang daripada memohon semakan kehakiman.

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Bye (HM Inspector Of Taxes) v. Gershon And Muriel Coren [1986] 60 TC 116 ***(dist)***

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(foll)***

Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2021] 9 CLJ 918 HC ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***

Faekah Hj Husin & Ors v. Menteri Besar Selangor (Pemerbadanan) [2021] 5 CLJ 733 FC ***(refd)***

Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 7 CLJ 487 HC ***(refd)***

Foo Loke Ying & Anor v. Television Broadcast Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Government Of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Government Of Malaysia v. Sarawak Properties Sdn Bhd [1994] 1 CLJ 514 HC ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors [2017] 6 CLJ 161 CA ***(refd)***

Jakinta Trading Sdn Bhd v. Director General Of Customs & Anor [2021] CLJU 678; [2021] 1 LNS 678 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(dist)***

Lai Cheng Cheong v. Sowaratnam Arumugan [1983] 1 CLJ 282; [1983] CLJ (Rep) 216 FC ***(refd)***

Lam Eng Rubber Factory (M) Sdn Bhd v. Pengarah Alam Sekitar, Negeri Kedah Dan Perlis & Anor [2005] 2 CLJ 157 CA ***(refd)***
Landmark Property Sdn Bhd v. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri & Anor [2021] 10 CLJ 954 HC ***(refd)***
Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Maritime Electric Co Ltd v. General Dairies Ltd [1937] AC 610 ***(refd)***
Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri [2011] CLJU 1002; [2011] 1 LNS 1002 HC ***(refd)***
MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2004] 8 CLJ 459 HC ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(refd)***
Preston v. Inland Revenue Commissioners [1985] 2 All ER 327 ***(foll)***
R v. Inland Revenue Commissioners, Ex Parte MFK Underwriting Agencies Ltd [1990] 1 WLR 1545 ***(foll)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 3 CLJ 123 CA ***(refd)***
Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2012] 1 CLJ 49 FC ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 4(a), 91, 99
Real Property Gains Tax Act 1976, ss. 13(1), 14(1)(a), (b), (3), 20(1), (2)
Rules of Court 2012, O. 53

For the appellant - Ashrina Ramzan Ali; Muhammad Farid Jaafar & Surani Che Ismail; Lembaga Hasil Dalam Negeri
For the respondent - Anand Raj; Foong Pui Chi & Cheong Wen Yie; M/s Shearn Delamore & Co
Amicus curiae - Nitin Nadkarni, Soon Jia Yin & Abhilaash Subramaniam; M/s Abilaash Subramaniam & Co

[Editor's note: For the Court of Appeal judgment, please see Kind Action (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2025] 1 CLJ 400 (affirmed).]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] This is the Ketua Pengarah Hasil Dalam Negeri/Revenue's appeal against the decision of the Court of Appeal in reversing the judgment of the High Court. The High Court had decided in favour of the Revenue when it dismissed the respondent's application for judicial review.

[2] Having considered the written and oral submissions of parties, we unanimously dismissed the Revenue's appeal. We now provide our reasons.

Background Facts

[3] The respondent is in the plantation business. Its parent company is Revertex Malaysia Sdn Bhd ("RMSB"). The ultimate holding company of the respondent is the Synthomer Group, a company incorporated in the United Kingdom.

[4] Synthomer Group decided that RMSB was to focus on Synthomer Group's core business activity, namely manufacture, trade and sale in chemicals (*ie*, synthetic resin and alkyd resin) and the respondent to carry out plantation business previously carried out by RMSB. For this purpose, the respondent entered into a sale and purchase agreement dated 24 May 2004 with RMSB, where plantation lands used by RMSB in Kluang, Johor were transferred to the respondent.

[5] The particulars of the lands are as follows:

(i) HS(D) 47663 Lot PTD 57386;

(ii) HS(D) 47664 Lot PTD 57387; and

(iii) HS(D) 47665 Lot PTD 57387;

(collectively referred to as "Mengkibol Estate").

[6] At all material times, the respondent derived its income from its plantation business, which was conducted on the Mengkibol Estate. Mengkibol Estate has always been recognised in the respondent's audited account as a fixed asset for the relevant years of assessment. And the respondent has duly paid income tax upon the same.

[7] There was a change in the top management of the Synthomer plc, the ultimate holding company in the United Kingdom, and following the change, in 2007, the Synthomer Group made a strategic decision to streamline the business activity of the Group. Synthomer Group decided to withdraw from the plantation business altogether and focus on its chemical manufacturing business. Towards that end, the respondent was to realise its investments in Lots PTD 57386 and PTD 57387. Lot PTD 57386 and Lot PTD 57387, measuring 427 acres and 1,471 acres, respectively, were subsequently subdivided into smaller lots ("the plantation lands").

[8] In accordance with the decision of the holding company, ten transactions took place between 2007 and 2017, where the respondent, *vide* several sale and purchase agreements, sold its plantation lands to various parties. In respect of these disposals of the lands, the respondent paid the real property gains tax under the Real Property Gains Tax Act 1976 ("the

RPGTA"). The RPGTA assessments and the real property gains tax certificates were issued by the appellant's Cawangan Pembayar Cukai Besar and Cawangan Kluang.

[9] In October 2019, in the course of a tax investigation conducted by the appellant's branch in Melaka, the appellant took the position that the proceeds from the respondent's realisation of its investments in the plantation lands is subject to income tax under s. 4(a) of the Income Tax Act 1967 ("ITA"). This is based on, among others, that the respondent's activities of realising its investments were in the nature of trade.

[10] The appellant raised notices of additional assessment dated 3 December 2020 for year assessments of 2010, 2015 and 2018 upon the respondent, imposing income tax and 60% penalties totalling more than RM81 million ("disputed notices"). The appellant did not discharge or revoke the earlier RPGTA certificate of clearance and RPGTA assessments in respect of the same transactions.

[11] The respondent contended that by not discharging or revoking the earlier RPGT certificate of clearance and assessments, the appellant's conduct is illegal and contrary to the principle against double taxation.

[12] The respondent filed an appeal under Form Q to the Special Commissioner of Income Tax (SCIT) and also judicial review proceedings in the High Court. *Via* the judicial review, the respondent sought for the following reliefs:

(i) an order for *certiorari* to quash the notices of additional assessment for year assessment 2010, 2015 and 2018 issued by the Revenue under the ITA;

(ii) a declaration that the notices are invalid in law; and

(iii) a declaration that the Revenue is bound by its action in recognising, accepting and acknowledging that the profit (if any) from the realisation of investments of the plantation lands are subjected to RPGTA and thus the Revenue cannot impose tax on the respondent under the ITA.

Proceedings In The Courts Below

[13] The following were the issues for determination by the High Court:

(i) whether the disputed notices for year assessment prior to 2015 were time-barred;

(ii) whether the Revenue was bound by the RPGTA certificate of clearance;

(iii) whether the Revenue had failed to give reasons for its decision;

(iv) whether it was improper for the applicant to bypass the alternative remedy of appeal to the SCIT; and

(v) whether imposition of the penalty by the Revenue was correct.

[14] The High Court dismissed the respondent's judicial review application on the following grounds:

(i) the Revenue's additional assessments were not statutorily barred and as the respondent has negligently failed to furnish the proper information and to make the proper declaration to the Revenue, the respondent's plea of limitation should be taken up before the Special Commissioners of the Income Tax ("SCIT");

(ii) the respondent's plea of double taxation is not tenable as pursuant to s. 91 of the ITA, the Revenue is given the power to make additional assessment; and because the Revenue had adjusted the RPGT payments made by the respondent;

(iii) the Revenue had not acted in bad faith or had breached any rules of natural justice;

(iv) that this was not a proper case to bypass the appeal to SCIT. Since the respondent had disputed the additional assessments, the issue of whether the gains from the disposal of the plantation lands should be subjected to the ITA would require a fact-finding exercise by SCIT;

(v) the imposition of penalty is linked to the facts of the case and the SCIT being judges of fact, would be the appropriate forum to decide on the correctness of the penalty imposed.

[15] On appeal, the Court of Appeal found that the High Court had arrived at a wrong conclusion in dismissing the respondent's judicial review application. The respondent's appeal was therefore allowed. The findings of the Court of Appeal may be summarised as follows:

(i) no acid test is applicable in judicial review cases (be it exceptional circumstances/error of law/abuse of power) but if a good case is brought before the court for review then in the interests of justice, the application ought to be allowed.

(ii) the Revenue has failed to act in accordance with the law. In failing or omitting to discharge or revoke the RPGTA certificate of clearance and assessments, it resulted in double taxation for the same land transactions under two different legislation, *ie*, the ITA and the RPGTA. The correct procedure in law was for the Revenue to discharge the assessments under the RPGTA and then raise the taxes under the ITA.

(iii) based on established principles, the Revenue's discretion to impose taxes is not absolute and unfettered. The power of the courts is not ousted where the discretion is not exercised in accordance with the relevant law.

(iv) as the Revenue had already issued the RPGTA certificate of clearance and RPGTA assessments in respect of the same land transactions, which are final and conclusive, the Revenue is bound by the certificate and the assessments, and the principle of estoppel should apply against the Revenue.

[16] The Court of Appeal also found that the High Court erred in holding that the SCIT is the proper forum under the provisions of the ITA to deal with the merits of the case but yet, in the same breadth, took a completely contradictory approach in her judgment by determining the merits of the appellant's claim.

[17] Dissatisfied with the decision of the Court of Appeal, the Revenue applied for leave to appeal to the Federal Court.

Questions Of Law

[18] Leave to appeal was granted to the Revenue/appellant on the following questions of law:

(i) whether the Court of Appeal can extend the reading of s. 20 of the Real Property Gains Tax Act 1976 ("RPGTA") relating to appeal under the RPGTA on the assessment raised under the Income Tax Act 1967 ("ITA");

(ii) whether finality of assessment under s. 20 of the RPGTA makes this appeal limited to RPGTA only or otherwise;

(iii) whether the Court of Appeal has jurisdiction to make findings of facts in a judicial review when the jurisdiction to find facts is vested in the Special Commissioners of Income Tax ("SCIT");

(iv) whether disputes relating to the merits of assessment raised under a taxing legislation involving question of law or mixed questions of law and facts may be determined by way of judicial review;

(v) whether the appellant as a statutory body can be estopped from exercising its statutory duty under the tax laws;

(vi) whether the appellant can raise tax assessment under the ITA in exercising its statutory duty despite the self-declaration by the respondent under the RPGTA; and

(vii) whether there exists double taxation under the ITA and RPGTA.

[19] Questions (i), (ii), (v), (vi) and (vii) generally concerned the finality of assessment under s. 20 of the RPGTA; whether there was double taxation in view of s. 20 of the RPGTA and the construction of s. 91 of the ITA. Questions (iii) and (iv) dealt with the issue of availability of a domestic remedy.

A **Submissions Of Parties**

[20] Essentially, it was the submission of learned counsel for the appellant that the appellant is allowed to take the RPGT return forms submitted by the respondent under s. 13(1) of the RPGTA "on the surface" and issued the RPGTA certificate of clearance and RPGTA assessments on that basis.

B

[21] Learned counsel further submitted that no audit was carried out under the RPGTA and that the clearance was issued based on the respondent's forms. However, subsequently, when audit investigation was carried out on the respondent, the true nature of the transaction came to light and the appellant found that the disposal of the plantation lands should be reported under the ITA instead of the RPGTA. This is because the facts on the whole show that the respondent's land transactions comply with badges of trade and are thus gains under the ITA.

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[22] It was further submitted by learned counsel for the appellant that what was final and conclusive under s. 20 of the RPGTA is the amount of real property gains tax assessed under the RPGTA. Since the issue of whether the gain is chargeable to income tax or real property gains tax had not been determined yet, there is no finality of the assessment under the RPGTA in this case. Learned counsel relied on the case of *Bye (HM Inspector Of Taxes) v. Gershon And Muriel Coren* [1986] 60 TC 116 ("*Bye*") to argue that the appellant is not precluded from raising an assessment under the ITA after the finalisation of the capital gains tax.

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[23] Learned counsel for the appellant contended that the issue of subjecting the respondent to both taxes and the issue of double taxation did not arise because the respondent has not been charged for both the real property gains tax and the income tax. In her own words, as captured in the written submission:

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> The income tax assessments are alternative to the capital gains tax assessment.
>
> No one has ever supposed for a moment that the Appellant were intending to levy double taxation or doing anything other than keep open the various alternatives until the uncertainties … had been determined.

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[24] Learned counsel also highlighted that the appellant had made the necessary adjustments after considering the RPGT payments made by the respondent and that there is no rule of law which precluded the appellant from proceeding to raise assessments under the ITA after the capital gains tax assessments had become final. According to learned counsel, there is 'no rule that the same sum cannot be subject to two separate taxes.'

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I

[25] Learned counsel argued that the appellant has the right and power to review and revise any assessment raised under RPGT. *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 3 CLJ 123 ("*Teruntum Theatre*") and *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] 8 CLJ 459; [2005] 7 MLJ 260 ("*MR Properties*") were cited to support her arguments.

[26] As regards legitimate expectation and estoppel, it was argued for the appellant that it cannot be estopped from discharging its statutory duty. Learned counsel highlighted the decision of the Court of Appeal in *Teruntum Theatre* that estoppel cannot be invoked against the DGIR when he is put to notice that an incorrect assessment has been made under the RPGTA. Various cases, including *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729, *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors* [2017] 6 CLJ 161 were cited in support of her submissions on legitimate expectation. Learned counsel had also submitted that complaints on legitimate expectation are matters that should be raised and determined by the SCIT.

[27] On the issue of availability of a domestic remedy, learned counsel for the appellant submitted that as s. 99 of the ITA provides for a right to appeal to the SCIT against an assessment, the respondent must avail itself of this remedy and thus it is not competent for the respondent to pursue judicial review. Reliance was placed on among others, *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 ("*Jagdis Singh*"). Learned counsel argued that whether tax under the RPGTA or the ITA should be imposed on the respondent involves finding of fact by the SCIT.

[28] As regards the decision of the Court of Appeal that the High Court erred in finding that the proper forum is SCIT but at the same time the High Court determined the merits of the appellant's case, learned counsel cited the decision of this court in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563 ("*Alcatel-Lucent*"). She argued that *Alcatel-Lucent* is the authority to support the proposition that although the courts have decided on the merits, the matter or the merits could still be ventilated before the SCIT.

[29] In response to the appellant's submissions on questions (i), (ii), (vi) and (vii), learned counsel for the respondent argued that the "on the surface" approach is not supported by law and in taking that "on the surface" approach, the appellant is ignoring their statutory duty under s. 14 of the RPGTA, which requires the appellant to consider the contents of the taxpayer's return first in order to decide whether to accept it or make adjustments to it and thereafter raise the assessment. Having raised the assessment and there being no appeal by the respondent, the appellant's assessment under the RPGTA was final and conclusive.

[30] Further, having raised the disputed notices under the ITA and not having discharged or revoked the earlier RPGTA certificate of clearance and the RPGTA assessments, the appellant has sought to impose liability under both the RPGTA and the ITA, which is contrary to law. This, contended learned counsel, is an illegal act on the part of the appellant, which amounts to exceptional circumstances enabling the respondent to pursue judicial review. Learned counsel similarly relied on *Teruntum Theatre* and *Jagdis Singh*. It was submitted that the conduct and/or decision of the appellant is tainted with illegality and on this ground alone, the appellant's appeal should be dismissed.

[31] On question (v), learned counsel for the respondent submitted, among others, that the RPGTA certificate of clearance and RPGTA assessments were issued by the Revenue over a period of seven years from 2011 to 2018. This, contended learned counsel, shows that the respondent has been given the assurance and confirmation multiple times by the appellant that all the transactions were indeed capital in nature and any reasonable taxpayer would rely upon such repeated and consistent assurances of the appellant. Learned counsel argued that this has created a legitimate expectation on the part of the respondent that the certificate of clearance and the assessments under the RPGTA are correct and that the DGIR will not resile from his position. Numerous cases were cited in support thereof including *R v. Inland Revenue Commissioners, Ex Parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 ("*MFK Underwriting*") and *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538; [2008] 4 MLJ 309 ("*Darahman*").

[32] Learned counsel for the respondent also highlighted that the case of *Darahman* has been recently applied by the High Court against Malaysian taxing authorities. The High Court decisions are *Landmark Property Sdn Bhd v. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri & Anor* [2021] 10 CLJ 954; and *Jakinta Trading Sdn Bhd v. Director General Of Customs & Anor* [2021] CLJU 678; [2021] 1 LNS 678. Applying these cases, learned counsel submitted that the fact that the appellant had issued the RPGTA certificate of clearance and assessments over a period of seven years clearly created a legitimate expectation that the disposals of the respondent's plantation lands are subject to real property gains tax under the RPGTA and as such, it would be unfair for the appellant to now shift their position and unlawfully tax the respondent again under the ITA.

[33] On the principle that there can be 'no estoppel', learned counsel accordingly submitted that the Court of Appeal was correct in law in holding that estoppel should apply against the appellant. It was also highlighted by learned counsel that the law on estoppel has evolved.

[34] The respondent also argued that the Court of Appeal was correct in finding that the High Court erred in law in holding that the SCIT is the proper forum under the provisions of the ITA to deal with the merits of the case, yet, proceeded to determine the merits of the appellant's claim.

[35] On the existence of a domestic remedy under the ITA, learned counsel for the respondent submitted that nowhere in O. 53 is it stated that the existence of a domestic remedy will bar an application for judicial review. And that it would be wrong to insist on the exhaustion of a domestic remedy where there are errors of law or abuses of power that goes to the legality of the conduct of the decision-making authority. Learned counsel relied on *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1; *Lai Cheng Cheong v. Sowaratnam Arumugan* [1983] 1 CLJ 282; [1983] CLJ (Rep) 216; [1983] 2 MLJ 113; *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] CLJU 1002; [2011] 1 LNS 1002; [2011] 5 MLJ 447; *Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] 7 CLJ 487; *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2021] 9 CLJ 918.

[36] Learned counsel for the Malaysian Bar who appeared as *amicus curiae* addressed the following points in his written submission – whether and when different legislations can be construed together; whether and when the doctrine of estoppel can be applied against public authorities/statutory bodies, in this case, the Director General of Inland Revenue; whether and when double taxation arises under the ITA and the RPGTA; whether the superior courts' jurisdiction in judicial review proceedings is confined only to dealing with issues of law, or whether it can also address issues of facts or mixed issues of law and facts.

Decision/Analysis

Finality Of The Assessment And Double Taxation

[37] The relevant provisions of the RPGTA are ss. 13(1), 14(1) and 20 as follows:

> **13. Returns**
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> (1) Every chargeable person who disposes of a chargeable asset and every person who acquires the asset so disposed of shall, within sixty days (or such further period as the Director General may allow on a written request being made to him) of the date of disposal of that asset, make a return –
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> (a) specifying in respect of the asset disposed of the acquisition price, the disposal price and the gain or loss on the disposal;
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> (b) furnishing all information necessary to determine the acquisition price and disposal price of the asset disposed of; and

A (c) where the market value of the asset is to be taken for the purposes of this Act, submit a written valuation of the asset by a valuer.

…

14. Assessments

B (1) Where a person makes a return under subsection 13(1), the Director General may –

(a) accept the return and make an assessment accordingly;

(b) make an assessment after making such adjustments as he considers necessary; or

C (c) reduce an assessment made for the year of assessment for which the return was made, in giving effect to paragraph 7(4)(a).

…

20. Finality of assessment

D (1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this Act as regards the amount of the tax assessed under it or the tax relief for allowable losses indicated in it, as the case may be –

(a) on the expiry of the time of appeal against the assessment; or

E (b) where an appeal is made, on the appeal being finally disposed of.

(2) Subsection (1) –

(a) shall not apply to an assessment made under subsection 14(3) until it is adopted as the assessment for the year of assessment to which it relates;

F (b) shall not prevent the Director General from making in respect of any year of assessment –

(i) an assessment under subsection 15(1) or (2); or

(ii) a revision under subsection 19(1).

G **[38]** The appellant in this case had accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance and RPGTA assessments under s. 14(1)(a) of the RPGTA. Since there were no appeals filed by the respondent, the assessments became final and conclusive under s. 20. In fact, learned counsel for the appellant conceded that the assessment H will become final and conclusive under s. 20 of the RPGTA when no appeal is filed by a taxpayer after the DGIR issued an assessment under s. 14(1) of the RPGTA. She argued however that the finality provision does not apply to an assessment made under s. 14(3) until it is adopted as the assessment for the year of the assessment to which it relates.

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[39] With respect, we found no merit in the submission of learned counsel for the appellant on s. 14(3) of the RPGTA. In the course of the hearing, we sought clarification from her whether any of the scenarios under s. 20(2) of the RPGTA apply to the respondent in the instant case. Her response was in the negative. Thus, pursuant to s. 20(1), the assessments issued by the appellant are final and conclusive.

[40] Learned counsel for the appellant had also submitted that the appellant can still tax the respondent for income under ITA after an audit is done, even if tax or assessment for capital under the RPGTA is final and conclusive.

[41] With respect, to accept the submission of learned counsel for the appellant would cause gross violation of the principle of double taxation and would run counter to the finality provision in s. 20(1). The words in s. 20(1) are clear. If there is no appeal by a taxpayer, and the circumstances stipulated under s. 20(2) do not arise, the assessment under RPGTA is final and conclusive.

[42] It is a trite principle of statutory construction that the courts will not read words into a statute. The duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. (See *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721; *Faekah Hj Husin & Ors v. Menteri Besar Selangor (Pemerbadanan)* [2021] 5 CLJ 733; [2021] 3 MLJ 893).

[43] In *Tebin Mostapa*, this court stated thus:

> … the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute.

(see also *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 6 MLJ 581 and *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299).

[44] Further, as submitted by learned counsel for the respondent, even if there is an ambiguity in the law, such ambiguity must be construed in favour of the taxpayer as decided in *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810; [2006] 1 MLJ 428 ("*Exxon Chemical*"). In *Exxon Chemical*, Gopal Sri Ram JCA (as he then was) said:

> [10] … the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision: no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1994] 1 MLJ 99]. The corollary of that proposition is that those parts in

A a revenue statute that favour the taxpayer must be read literally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

[45] In *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99, this court stated thus:

B … in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. …

[46] The words in s. 20(1) are clear. As stated by the Supreme Court in *Foo*
C *Loke Ying & Anor v. Television Broadcast Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35, the court is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and
D it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. We therefore found no reason not to give effect to the clear words of 'final and conclusive' in s. 20(1) of the RPGTA, which means what it says. The definiteness and certainty of the legal position must be maintained (see *Asia Pacific Higher Learning Sdn Bhd*
E *v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1).

[47] Learned counsel for the appellant also contended that the appellant is at liberty to take the return "on the surface" and to "keep open the various alternatives". We agreed with the respondent that nowhere in the RPGTA is it provided that the appellant can take the RPGT return "on the surface"
F first and think about it later. In our view, it would be consistent with good governance that the appellant undertakes an investigation or audit first, before issuing the assessment. This would be consistent with the overall scheme of s. 14(1) of the RPGTA, which gives the discretion to the Director General to either accept the return and make an assessment accordingly or
G make an assessment after making such adjustments as he considers necessary.

[48] The appellant's position to "keep open the various alternatives" cannot be accepted as that position amounted, in effect, to taxing the respondent under both the RPGTA and the ITA. The law clearly prohibits the appellant from taking that course of action. As observed by Raus Sharif
H J (as His Lordship then was) in *MR Properties*: "the act of the respondent to switch from one Act to another would result in no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction." To "keep open the various alternatives" would also result in a perpetual uncertainty in tax position. To our mind, this cannot be the
I intention of Parliament having regard to the final and conclusive provision in the law.

[49] At this juncture, it is perhaps pertinent to cite Edgar Joseph Jr FCJ in *Government Of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701; [1995] 2 MLJ 105, where he referred to the judgment of the High Court in the same case:

> … The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfill the collection of certain publicly declared targeted amount of taxes and whose assessments, as a result may be influenced by the target to be achieved rather than the correctness of the assessment.

[50] In the instant case, the appellant, under s. 14(1)(b) could have made the necessary adjustments before issuing the assessments under the RPGTA. They did not deem it necessary to do so. Instead, they issued the RPGTA certificate of clearance and assessments. Seven years later, the appellant issued notices/assessments under the ITA for the same transactions of the respondent's plantation lands. The earlier RPGTA certificate of clearance and the RPGTA assessments were not revoked. As found by the Court of Appeal, this in effect resulted in double taxation for the same land transactions but under two different legislations, *ie*, once under the RPGTA and later under the ITA. This is clearly an illegality.

[51] In *MR Properties,* Raus Sharif J (as His Lordship then was) held:

> 8. In short, the argument by the learned counsel for the appellant is that there is no statutory power for the respondent to 'vacate' an assessment under RPGT and then having done so, to switch to another assessment under the ITA. According to the learned counsel, that the act of the respondent to switch from one Act to another would result in no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction.
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> 9. To support his argument, the learned counsel for the appellant referred to a number of English cases in particular two Houses of Lords cases of *Garvin v. Inland Revenue Commissioners and related appeals* [1981] STC 344 and *Bird and others v. Inland Revenue Commissions and related appeals* [1988] STC 312.
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> 10. The Special Commissioners, as can be seen in the case stated, dealt with the two cases as follows:
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> > What clearly emerged from *Bird* and *Garvin* is strong judicial misappropriation of double taxation. We wholeheartedly agree with the sagacious view of the House of Lord. As Lord Keith said in *Garvin*, it is not open to the Revenue to subject a taxpayer to two different charges of tax in respect of the same receipts. ….
> >
> > In Malaysia, the relevant laws are specific in their application. The ITA applies only to income and RPGTA applies only to capital gains on real property. The question of subjecting a taxpayer to both the taxes in respect of the same receipt cannot arise. The corollary is that any attempt by the respondent to impose both taxes will be legally untenable. If the appellant has been subjected to both taxes, the objection by the appellant is perfectly valid.

> 11. I am in agreement with the above reasoning of the Special Commissioners. I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable. There is also no possibility for a taxpayer being liable to both taxes in respect of the same gain because under the definition of gain under RPGT, it refers to 'gain other than gain or profit chargeable with or executed from income tax'. Thus, if the gain is from the sale of an asset is found to be of an income nature, then the assessment cannot be under RPGT because such gain should be taxed under the ITA. Thus, there is no possibility of a tax payer being liable to both taxes on the same gain.

[52] The appellant argued that they have the power to review the assessments and that the Court of Appeal erred in law in deciding that the ITA assessments resulted in double taxation. It was further argued that the Court of Appeal had failed to consider that the appellant had made the necessary adjustments of the payment made by the respondent under the RPGTA.

[53] We disagreed with the appellant that the Court of Appeal erred in this respect. We found that the Court of Appeal has considered the appellant's submission on the necessary adjustments as apparent in its grounds of judgment reproduced below:

> [35] Turning to the facts of the present case, the Respondent before us did not dispute that the initial assessment under the RPGTA 1976 was not discharged but went on to submit that the Respondent had made the necessary adjustments in consideration of the payment made by the Appellant under the RPGTA 1976 and decided to raise the respective assessments under the provisions of the ITA 1967. According to the Respondent, they are allowed to do so under the law.
>
> [36] We disagree with the Respondent. In our view, as the law stands, the correct procedure in this instance was for the Respondent to have revised and discharged the assessment under the RPGTA 1976 and then raise the taxes under the ITA 1967.

[54] The finding of the Court of Appeal in the instant case is consistent with the decision of the Court of Appeal in *Teruntum Theatre,* where the Court of Appeal stated thus:

> [19] … there is no rule of law precluding Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA. That Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGT and then raise an assessment under the ITA.
>
> [20] On the issue of double taxation, we agree that the position is Malaysia is different from that in England. The ITA applies only to income, whilst the RPGT applies only to capital gains on real property. It

has to be one or the other, it cannot be both. Unlike in England, the question of subjecting a taxpayer to both taxes in respect of the same receipt cannot arise here. The authorities cited by the appellant on this issue are clearly distinguishable.

[55] It was also contended for the appellant that the Court of Appeal erred in failing to consider that the appellant is empowered to raise the assessments under s. 91 of the ITA and in that regard further erred in holding that the appellant is estopped from raising the tax under the ITA. We found the submission of learned counsel misplaced. This is not a case where the Court of Appeal found that the appellant is not empowered under s. 91 of the ITA to raise assessments against the respondent. This is a case where the Court of Appeal found that the appellant had acted contrary to law by imposing tax on the respondent both under the RPGTA and the ITA, which resulted when the appellant failed to discharge the RPGTA certificate of clearance and the RPGTA assessments before revising and imposing tax on the respondent under the ITA.

[56] In *Teruntum Theatre*, one of the issues that arose for determination of the Court of Appeal was whether, after having assessed the taxpayer for real property gains tax under the RPGTA, and upon payment of the sum assessed and a certificate of clearance issued, the Revenue could vacate the assessment and re-assess the appellant for income tax on the same receipt as a trading gain under the ITA.

[57] The crux of the argument in *Teruntum Theatre,* which was taken by way of a preliminary issue, was that once an assessment for capital gains had become final by reason of the capital gains tax having been paid and certificate of clearance issued, from then onwards, the matter became final and conclusive. It was the taxpayer/appellant's case that the Revenue/respondent was precluded from raising an assessment to income tax.

[58] Referring to the case of *Maritime Electric Co Ltd v. General Dairies Ltd* [1937] AC 610, the Court of Appeal in *Teruntum Theatre* held that estoppel cannot be invoked against the Revenue/DGIR when he is put to notice that an incorrect assessment has been made under the RPGTA and that the DG cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law. The Court of Appeal further held that there is no rule of law precluding the Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA, that if the facts and circumstances warrant it, the Revenue is free to revise and discharge the assessment under the RPGT and to then raise an assessment under the ITA.

[59] Learned counsel for the respondent submitted that *Teruntum Theatre* should be treated as *per incuriam* as the Court of Appeal did not consider the crucial provisions of 'final and conclusive' of the RPGTA and had misunderstood the Privy Council case of *Maritime Electric. Maritime Electric,* according to learned counsel, was completely irrelevant as it was not a tax case nor a public law case.

[60] We were not with the respondent on the *per incuriam* point. We noted that the issue on final and conclusive assessment was submitted by the taxpayer there, and while we disagreed with the Court of Appeal in *Teruntum Theatre* on the point of estoppel (for the reasons set out below), the decision in *Teruntum Theatre* that Revenue may issue assessment under the ITA if the facts and circumstances warrant it, but after discharging the assessment under RPGTA, is consistent with numerous other cases. To that extent, *Teruntum Theatre* is still a good law.

Legitimate Expectation/Estoppel

[61] As adverted to earlier, the Court of Appeal in *Teruntum Theatre* referred to an old case of *Maritime Electric*. The same principle that there can be no estoppel against the Crown on tax/revenue matters was also decided in *Government Of Malaysia v. Sarawak Properties Sdn Bhd* [1994] 1 CLJ 514; [1994] 1 MLJ 14 ("*Sarawak Properties*").

[62] Learned counsel for the respondent submitted that the old case of *Sarawak Properties* is no longer good law, particularly in matters where the Revenue by their conduct has exceeded or abused their powers and/or had given rise to legitimate expectation and that the other jurisdictions have moved on in terms of the law on estoppel.

[63] We agreed with the respondent that the law on the principles of estoppel and legitimate expectation in Malaysia, as in other jurisdictions such as India and Hong Kong has evolved (see for example, *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1; *Lam Eng Rubber Factory (M) Sdn Bhd v. Pengarah Alam Sekitar, Negeri Kedah Dan Perlis & Anor* [2005] 2 CLJ 157; [2005] 2 MLJ 493; *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538; [2008] 4 MLJ 309; *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; [2009] 3 MLJ 452; *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors* [2017] 6 CLJ 161; [2017] 5 MLJ 116).

[64] In the instant case, the appellant had taxed the respondent under both the legislations of RPGTA and the ITA. The position taken by the appellant is that they should not be estopped from performing their statutory functions and that the Court of Appeal should have preserved the *status quo* of both assessments under the RPGTA and the ITA until the determination by the courts, which is the principle and spirit of the decision in *Teruntum Theatre*.

[65] The effect of upholding the appellant's position is that the respondent will be subjected to tax under both the RPGTA and the ITA. This is contrary to law as it is trite that in Malaysia, a taxpayer can only be taxed either under the RPGTA or the ITA and that there can be no overlap between the RPGTA and the ITA.

[66] Further, to accept the appellant's submission that the RPGTA certificate of clearance and the RPGTA assessments be held in abeyance, would render s. 20 of the RPGTA completely redundant. The position taken by the appellant is not supported by law as there is nothing in the RPGTA that speaks of holding the RPGTA certificate of clearance and assessments in abeyance.

[67] Our reading of *Teruntum Theatre* also did not support the appellant's contention that having applied both tax legislations of the RPGTA and the ITA, the assessments must be held in abeyance until the dispute is determined. What was decided in *Teruntum Theatre* was that the Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGTA and to then raise an assessment under the ITA.

[68] The issue that the appellant could not be estopped from performing its statutory functions did not arise here as the appellant is only expected to perform its function as required by law and not otherwise. On the facts, the appellant had clearly taxed the respondent under both the RPGTA and the ITA. As alluded to earlier, it is illegal for the appellant to do so, as in effect, it amounts to double taxation.

[69] Further, it was not disputed that the respondent has been given assurances multiple times over a period of seven years, from 2011 to 2018, that all the transactions are indeed capital in nature. In *Preston v. Inland Revenue Commissioners* [1985] 2 All ER 327, the House of Lords held:

> … judicial review should in principle be available where the conduct of he commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of representation giving rise to an estoppel. Such a decision could be an abuse of power; whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide …
>
> In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and appropriate remedy.

[70] In *MFK Underwriting Agencies*, the House of Lords stated thus:

> It was not inconsistent with the Revenue's statutory duty for the Revenue to advise a taxpayer as to his rights and duties where an approach was made by the latter for such advice. However, if a public authority so conducted itself as to create a legitimate expectation that a certain course would be followed, it would be unfair if the authority were permitted to follow a different course to the detriment of the person who

A entertained the expectation, particularly if he acted on it. Accordingly, if the Revenue agreed to, or represented that it would, forgo tax which might arguably be payable on a proper construction of the relevant legislation, and the taxpayer relied on such agreement or representation, the Revenue would be bound by that agreement or representation and a decision to resile therefrom would be unfair and subject to judicial review
B on the ground of abuse of power ...

... The doctrine of legitimate expectation is rooted in fairness. ...

[71] In *Darahman*, the Court of Appeal referred to, among others, *MFK Underwriting Agencies* on the issue of legitimate expectation. The Court of
C Appeal held thus:

... A taxpayer, for instance, must rely upon a representation from the Revenue before his expectation will be protected ...

...

D ... I now revert back to the doctrine of legitimate expectation. This doctrine is often used in the field of public law. If used wisely, this doctrine serves as an effective weapon in challenging decisions of public bodies. If a decision is adverse to the person affected, it must follow a procedure that is fair. ...

The following principles of law must be advanced:

E

(a) There should be such unfairness as to amount to an abuse of power. If a statement has created a legitimate expectation that a certain decision will be taken or that decision will be taken on the assumption that a certain fact is true, it will often be unfair and an abuse of power to resile from it. The court will act and will impose
F the requirement of fairness on the public body concerned.

(b) The requirements giving rise to a legitimate expectation must be present. These requirements are similar to the requirements of estoppel in private law ... The requirements are – that the body concerned made a representation which was clear, unambiguous and devoid of qualification: that the Applicants was within the
G category of people to whom it was made and that it was reasonable for him or her to rely on the representation and that the representee relied on such representation to his or her detriment.

(c) ...

H (d) It is for the court to decide whether there is overriding reason for frustrating the legitimate expectation. In doing so, the court must always put to the forefront the question of fairness.

[72] Learned counsel for the appellant sought to rely on *Bye* to argue that the appellant was not precluded from raising an assessment under the ITA
I after the finalisation of capital gains tax. With respect, *Bye* is distinguishable. In *Bye*, the capital gains tax assessments were issued as an alternative to the

income tax assessments and the taxpayers were fully aware about this at the outset. Here, at the risk of repetition, the appellant shifted their position after seven years against the legitimate expectation of the respondent.

[73] Applying *Darahman* and the other cases cited above, the appellant's certificate of clearance and assessments under the RPGTA, which were never discharged or revoked, has created a legitimate expectation on the part of the respondent that they are correct and the appellant is now estopped from shifting its position. And to the extent that *Teruntum Theatre* and *Sarawak Properties* decided that estoppel cannot be invoked against the Revenue, we found that they are no longer good law.

Domestic/Alternative Remedy

[74] On alternative remedy, the Court of Appeal held that there is no acid test applicable in judicial review applications and that if a good case is brought before the court for review, for instance, if there is clear illegality on the part of the decision-making authority, then it is in the interest of justice that such application be allowed. The Court of Appeal found that on the facts of the present case, the decision of the appellant in issuing the disputed notices was tainted with illegality.

[75] There was no error committed by the Court of Appeal in dismissing the appellant's contention that this was not a proper case for the respondent to bypass the avenue to appeal to SCIT. The finding of the Court of Appeal is supported by the authorities (see *Jagdis Singh;* and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 ("*Sungai Gelugor*").

[76] In *Jagdis Singh*, Hashim Yeop A Sani SCJ (as he then was) said:

> A clear principle is reiterated here *ie*, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

[77] In *Sungai Gelugor*, this court stated thus:

> The reason for this is that whilst in theory the courts there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to Judicial Review, in practice, the courts are often much kinder to the applicant with a good case on the merits, who is faced with this hurdle to clear and will most probably entertain this application as an exception …
>
> … Speaking generally, it is right to say that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of

> Judicial Review rather than appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest.
>
> … Having said that we recognize that there are certain classes of cases such as planning, employment cases and tax cases … where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess of power, or breach of the rules of natural justice.

[78] Citing *Alcatel-Lucent*, the appellant argued that the High Court did not err in deciding on the merits of the case. We found that the reliance by the appellant on *Alcatel-Lucent* was misconceived. The case of *Alcatel-Lucent* does not support the appellant. In *Alcatel-Lucent*, the taxpayer succeeded in their judicial review application before the High Court, where they sought for an order of *certiorari* to quash the decision of the Revenue to levy withholding tax. The decision of the High Court was affirmed by the Court of Appeal. On Revenue's appeal to this court, it was found, among others, on the merits, that there was no flaw detectable in the decision-making process and there was also no illegality or irrationality in the decision of the Revenue. The existence of a domestic remedy did not form part of the *ratio* of this court's decision.

[79] Hence, *Alcatel-Lucent* is not the authority for the proposition suggested by the appellant that the courts could decide on the merits and the same can still be determined by SCIT. In any event, the appellant's decision in the present case, as found by the Court of Appeal, was tainted with illegality. Thus, the matter was rightfully brought by the respondent by judicial review to quash the illegal decision.

[80] Learned counsel for the appellant's submission that complaints on legitimate expectation are matters that should be raised and determined by the SCIT is also devoid of any merit.

Conclusion

[81] We found no appealable error by the Court of Appeal that warrants our appellate intervention. The effect of the appellant's decision in issuing the disputed notices and in charging the respondent under both the RPGTA and the ITA amounted to an illegal act and contrary to the principle against double taxation. We agreed with the Court of Appeal that the principle of estoppel should apply against the appellant.

[82] We further agreed with the Court of Appeal that the High Court erred in concluding that the proper forum is SCIT and in taking a contradictory stand by dealing with the merits herself. Having found that the merits are appropriately for the SCIT to determine, the High Court should not have proceeded to decide on the issues of negligence, limitation and sinister or bad faith.

[83] We therefore unanimously dismissed the appeal with costs. We declined to answer the leave questions.

Abu Bakar Jais FCJ (concurring):

Introduction

[84] The main written judgement for this case has been prepared and drafted by our learned sister, Tengku Maimun Tuan Mat CJ, and my learned sister, Rhodzariah Bujang FCJ, and I agree to the same. In turn, this written judgment supporting that main written judgement deals with only two issues in support of our unanimous decision to dismiss the appeal. The first is on the issue of estoppel/legitimate expectation. The second is on the issue of whether in the first place the substantive matter must be heard by the Special Commissioners of Income Tax ("SCIT") before it is litigated at the High Court ("HC"). The material facts of this case are already alluded to in the main written judgment. There is no reason to repeat the same.

Estoppel And Legitimate Expectation

[85] Essentially, the argument by the respondent on this point is that the appellant could not further act in imposing additional income tax on the former pursuant to the Income Tax Act 1967 ("ITA"). This is because the appellant had earlier imposed real properties gain tax ("RPGT") under the Real Property Gains Tax Act 1976 ("RPGTA") on the sale of the relevant lands by the respondent and this tax had been paid. The appellant also issued a certificate of clearance pursuant to the RPGTA for this payment made by the respondent. This certificate was never revoked by the appellant. Under such circumstances, the respondent argued that estoppel would apply against the appellant preventing them to impose further or additional tax pursuant to the ITA and there is legitimate expectation for the respondent that additional tax could not be imposed by the appellant pursuant to the ITA.

[86] The appellant, on the other hand, submitted that additional income tax could be imposed under the Income Tax Act 1967 ("ITA") as the proceeds from the sale of the lands constituted business income and the respondent's activities of realising its investment were in the nature of trade. Essentially, the appellant contended that the sale of the lands was not disposal of capital assets subject to RPGT but disposal of stock in trade subject to income tax.

[87] In our view, since the appellant had accepted the RPGT returns filed by the respondent and also issued RPGTA certificate of clearance, this would reflect that the appellant had acted on the basis of s. 14(1)(a) of the RPGTA that states as follows:

> 1) Where a person makes a return under section 13(1), the Director General may:
>
> (a) accept the return and make an assessment accordingly;

[88] Further, since there were no appeals filed by the respondent, the assessment became final and conclusive pursuant to s. 20(1) of the RPGTA that states as follows:

> 1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this act as regards the amount of the tax assessed under it or the allowable losses indicated in it, as the case may be:
>
> (a) on the expiry of the time for appeal against the assessment; or
>
> (b) where an appeal is made, on the appeal being finally disposed of.

[89] We are of the opinion that estoppel would set in against the appellant. In the circumstances of the present case, estoppel *in pais* (estoppel by words or conduct) would apply here, preventing the appellant to impose the tax under the ITA. Once the RGPT is imposed and the certificate of clearance is issued, the appellant would be estopped from imposing further tax under the ITA. There would also be legitimate expectation that the respondent would not be required to pay further tax under the ITA as the RPGT had been paid and the certificate of clearance had been issued for this payment, none other by the appellant.

[90] In this regard, it is also relevant to note that Raus Sharif J (later CJ) in *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] 8 CLJ 459; [2005] 7 MLJ 260 said:

> I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable.

[91] There is another relevant point to consider regarding further notices for tax under the ITA raised by the appellant and after not discharging or revoking the earlier RPGTA certificate of clearance and assessments. This is related to the fact it has resulted in the same land transactions being subjected to tax under the said two different legislations.

[92] That action and conduct of the appellant is clearly illegal and must amount to double taxation.

[93] We also could not agree with the appellant that the Court of Appeal case of *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 3 CLJ 123; [2006] 4 MLJ 685 supports the contention that the RPGTA certificate of clearance and RPGTA assessments can be held in abeyance pending the court's final determination on whether the land transactions should be taxed under the RPGTA or the ITA. One would not be able to discern this if one reads the whole of this case. There is nothing in the same to suggest that the certificate and the assessment can be held in abeyance as submitted by the appellant based on this case.

[94] On a more serious note, this contention of the appellant, if accepted, would mean the finality provision in s. 20(1) of the RPGTA on the assessment for RPGT as narrated earlier is of no effect.

[95] In any event, there is no provision in the RPGTA that stipulates RPGTA certificate of clearance and RPGTA assessments can be held in abeyance.

SCIT Or HC

[96] The Court of Appeal ("COA") was also not in error in finding that the existence of a domestic remedy will not bar an application for judicial review. Therefore, there is no obligation for the respondent to go before the SCIT prior to seeking the appropriate remedy by way of judicial review before the HC. The COA is also not erroneous in finding there is no requirement in O. 53 of the Rules of Court 2012 (the ROC 2012) that the availability of a domestic remedy will bar an application for judicial review.

[97] The courts have long acknowledged, based on landmark Supreme Court and Federal Court decisions, that the availability of an alternative internal remedy in the form of an appeal process will not be a complete bar of an application for judicial review. In this regard, the COA had correctly referred to the Supreme Court decision in *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185, where Hashim Yeop A Sani SCJ said as follows:

> A clear principle is reiterated here *ie*, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

[98] The COA also correctly referred to what was said by Edgar Joseph Jr FCJ in delivering judgment in the Federal Court case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 as follows:

> Having said that we recognize that there are certain classes of cases such as planning, employment cases and tax cases (see, *eg, R v. Commissioner for the Special Purposes of the Income Tax Acts; ex p Napier* [1988] 3 All ER 166; *R v. Epping Forest DC; ex p 'Green* [1993] 1 COD 81) where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review *but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice* (see *Accountant in bankruptcy v. Alls of Gillock* [1991] SLT 765 *Macksville & District Hospital v. Mayze* (1987) 10 NSWLR 708). (emphasis added)

[99] Thus, judicial review would still be applicable following the above decision when there is excess or abuse of power. In the present case before us, there is indeed an excess or abuse of power as the appellant should not have further imposed tax on the respondent under the ITA, having done so under the RPGTA. Therefore, the respondent should not be prohibited in applying for judicial review.

Conclusion

[100] The determination on these two issues as explained above would mean the appeal must be dismissed.

[101] The appellant's action in imposing tax under the ITA should be estopped and the appellant's action in imposing the tax under the RPGTA had provided the respondent a legitimate expectation that tax under the ITA would not be further imposed.

[102] The respondent's action in filing the judicial review application at the HC is also permissible without the need to go before the SCIT.